Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

79-1691

FAHAD AHAIMAD SUBAITANI
Petitioner,

v.

THE STATE OF MARYLAND
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

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Petitioner,

v.

THE STATE OF MARYLAND
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

H. Hugo Perez, counsel for Fahed A. Subaitani, petitioner herein, on his behalf respectfully presents this petition and requests that the Supreme Court of the United States grant this petition for a Writ of Certiorari to review the decision of the Court of Special Appeals of Maryland in the above captioned case.

Opinions Below

Opinion and Order of the Circuit Court for Montgomery County Maryland. Order of denial by the Court of Appeals of Maryland of petition for a writ of certiorari. Both of these opinions are printed in the Appendix at page A-1.

JURISDICTION

Petitioner relies, as the basis for jurisdiction of this Supreme Court of the United States, upon section *1254-1257* Title 28 of the U.S. Code.

Petititioner declares that there are here very ". . . fundamental, important and unique reasons which go to the heart of the Constitutional, human and civil rights of the individual. . ." as protected by the United States Constitution within the meaning of our Bill of Rights, as more specifically set forth immediately following the questions presented for review and arguments applying the reasons relied on for allowance of this Writ of Certiorari.

ORDERS

Petitioner, Fahed Ahaimad Subaitani, was convicted on August 12, 1976 of the crimes of child abuse and assault and battery, by a jury in the Circuit Court for Montgomery County, Maryland. (Frosh, J.)

The Court of Special Appeals of Maryland, on June 9, 1977, affirmed Judgment of the Circuit for

Montgomery County, Maryland, but remanded case for Re-sentencing.

The Court of Appeals of Maryland on September 7, 1977 denied Petitioner's Writ of Certiorari.

The Supreme Court of United States, on December 1, 1977, extended the time to file Petition for Certiorari.

The Circuit Court for Montgomery County on April 10, 1978 denied Petitioner's Application for Relief which cited inadequacy of counsel as grounds thereof.

The Court of Special Appeals on June 16, 1978 denied Petitioner's application for leave to Appeal from denial of relief sought in the Circuit Court.

Questions Presented

Were petitioner's substantive and procedural constitutional rights violated?

1. While-in-custody-statements made by accused, under coercion and fear, without full Miranda warnings were extremely damaging when subsequently admitted at State criminal trial.

2. Accused in fact was not allowed, despite continuous requests, to put on the key witness to his

defense, to wit, the alleged victim who could have cleared him of all charges.

3. Violating the best evidence rule repeatedly, alleged statements by the child were admitted through hearsay. Subsequently the child did give favorable testimony for the accused, before trial judge conducting the sentencing hearing and the Motion for New Trial at the same time; testimony which if elicited at the proper time during the trial of the case before a jury, would have exonerated petitioner.

4. Accused's right to indispensable pre-trial discovery was fully ignored and none was afforded him.

5. Lack of sufficient evidence to convict beyond a reasonable doubt at the trial of this felony charge. Accused's conviction was obtained based on highly emotional hearsay evidence as extracted by the prosecutor, creating a bias fatally prejudicial in the minds of the jury.

6. Complete indifference of the trial judge, prosecutor and defense attorney, to meet the minimum judicial and prosecutorial standards throughout the conduct of the trial.

7. The trial judge lacked in mature judicial temperament and erred in not rendering a judgment N.O.V. or in not granting a mistrial Sua Sponte, because of lack of sufficient evidence to sustain the jury's verdict and the numerous errors at the trial of the case.

8. Should our judicial system allow a conviction of an innocent person to stand not allowing proper review, in view of clear malfeasance, nonfeasance and an all around inadequacy of defense counsel.

Constitutional and Statutory Provisions Involved

The Bill of Rights of the United States Constitution

1. Article IV. "The right of the people to be secure in their persons, houses, . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, particularly describing place to be searched and person to be seized.

2. Article V. ". . .; nor shall any person be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law;. . ."

3. Article VI. "In all criminal prosecutions the acccused shall enjoy. . . the right to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

4. Article XIV. ". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes

28 United States Code Sect 1257(3)
Maryland Child Abuse Statute; Art 27, Sect 35A

Federal Case Cited

Mincey v. Arizona, 437 U.S. 385 (1978)

Statement of the Case

Introduction

This case presents the question of the Constitutionality of Maryland State Courts in providing a Trial which affords the accused person, petitioner herein, only a pretense at presenting his defense, rather than a complete opportunity to present his full substantive and procedural defenses; that is a full trial with all due process of law safeguards any accused is entitled to. Subsequently, a complete indifference, arbitrary and capricious denial by the Maryland higher courts in granting a new trial or an appeal.

The Facts of the Case

Fahed Ahaimad Subaitani, petitioner herein, was convicted August 12, 1976 upon trial by jury of child abuse and assault and battery, a felony charge which by Maryland statute carries a maximum penalty of 15 years in the penitentiary. The trial took place in the Circuit Court for Montgomery County, Maryland (Stanley B.

Frosh, Judge). Petitioner was sentenced to serve six (6) years in the Maryland Department of corrections, with five (5) years suspended; the remainder of the sentence to be served at Montgomery County Detention Center, and upon release to be placed on five (5) years supervised probation. From the Judgment imposing said sentence, petitioner moved for a New Trial. Imposition of the sentence and the Motion for a New Trial were heard at the same time. Motion for a New Trial denied by Circuit Court for Montgomery County, Maryland. Petitioner's subsequent Writ of Certiorari denied. Post conviction Hearing Application for relief, denied. Application for leave to Appeal from the Circuit Court for Montgomery County to the Court of Special Appeals of Maryland, denied.

Petitioner's wife Cathy telephoned from work, the day of the alleged offense, to remind petitioner that their five (5) year old Jennifer "must have a shower" before petitioner leaves for school at 6 p.m. A dutiful father, petitioner proceeded to do just that, and as Jennifer was being helped by her father into the tub, she lost her balance and fell onto the shower knobs, suffering minor injuries to her head. That brought about the felony charges of child abuse assault and battery, involving the Maryland statute which carries a maximum penalty of fifteen (15) years in the penitentiary. Had petitioner not been a loving father, mindful of his daughter's immediate welfare, he could have just left for school, since a baby sitter arrived at 6 p.m. So, a father who instills good habits and discipline in his daughter, is prosecuted, convicted and

imprisoned, and barred from obtaining his U.S. citizenship.

The Proceedings below were replete with constitutional irregularities and outright fraud

The prosecution sought conviction at any cost. Efforts were, all too obvious, towards personal gain and reputation, bringing all force to bear and succeeding in convicting an innocent person.

The trial of the alleged criminal charges labelled "Child abuse, Assault and Battery" was conducted in an arbitrary and capricious manner as allowed by Judge Frosh, whereas two (2) medical Doctors, Annette H. Ficker, an outstanding pediatrician, and Willian T. Allman, M.D.; and Juvenile Judge, Honorable John C. Tracey, all did professionally determine, after personally conversing with the child, Jennifer, and after having conducted a thorough physical examination, that there was no evidence to substantiate a child abuse charge.

The prosecution was based on alleged facts furnished by a totally deranged informant, Michael Ballew, uncle of the child, who has a long history of drug usage, alcoholism, psychiatric imbalance and more, since the age of ten (10) years. In addition, the prosecution relied upon the inconsistent testimony of the social worker, Cindy Williamson, who had been appointed by Juvenile Judge Tracey, the presiding Judge at the Juvenile proceeding, as a counselor and

advisor to petitioner. Judge Tracey was much surprised and exceedingly perturbed to find out that Ms. Williamson's testimony was permitted to be introduced in the criminal proceedings before Judge Frosh.

No criminal intent was proven, nor even mentioned at any time, to the felony charges against petitioner.

Moreover, petitioner's trial counsel did not engage in any pre-trial discovery nor does the record show any which was essential to the preparation of an adequate defense.

While the duties of the prosecution are to fairly place relevant evidence before the Court, here the prosecution obtained a conviction by willfully supressing known favorable evidence to the accused.

The Context of the Problem

Petitioner, Fahed Ahaimad Subaitani, was the target and victim of a preconceived, ill advised prosecution, and a Court which played the role of an onlooker, rather than judicially presiding over the trial; a trial which unfolded in a setting such, that no endeavor was made to find out the truth, but where the prosecutor was out to crucify the accused at any cost. Petitioner's trial, at best, constituted a case of entrapment; defense counsel playing into the hands of the prosecutor, and the trial Judge looking the other way; all of which served only to convict an innocent person. In this case the accused was prejudged guilty until

proven innocent; but worse, the miscarriage of justice was that accused was never given an opportunity even to prove his innocence; and so an innocent person was convicted.

NATURE OF THE OFFENSE

By Statute* the Maryland Courts characterize "Child Abuse" as a felony and upon conviction, such felony carries a penalty up to fifteen (15) years in the penitentiary. The same statute defines "Abuse" as physical injury to a child either as the result of cruel or inhuman treatment or as the result of a malicious act by any parent . . . " The word "malicious" means exercising malice, dictated by hatred or spite; done with wicked or mischievious intentions or motives. Accordingly, that State statute under which petititoner was being held to answer, and subsequently convicted, is and must be a criminal statute for purposes of basic due process requirements. Therefore petitioner's trial should have met all the prerequisites of constitutional due process. Most basic to a fair trial, when considering the nature and seriousness of the alleged charges, is the opportunity for confrontation of the accuser by the accused; the disallowance of hearsay evidence; a showing of criminal intent through the introduction of substantial evidence, and the submittal of proof that the accused was guilty beyond a reasonable doubt. Even more important is the need for a presiding judge to act impartially and take cognizane of the inadequacy of defense counsel.

*Art. 27, Sec. 35A.

We submit that this Court should grant this Writ of Certiorari, for the proceedings below were totally lacking in the most fundamental of due process safeguards of the accused. The imposition of guilt took place in an atmosphere wholly violative of the constitutional rights of petitioner; rights that this august body has consistently declared to be inalienable.

The Opinion Below: The Due Process Issue

The rulings of the Maryland Courts precluded petitioner from presenting a defense. The trial judge allowed every irregularity during the conduct of the trial, prejudicing defendants rights. The higher courts of Maryland conveniently affirmed the trial court's conviction, bringing about one of the most offensive miscarriages of justice ever to take place. There was not the exercise of judicial concern by the trial judge to provide due process of law. From the outset petitioner was barred from pursuing and exhausting his legal remedies.

If the trial judge, the prosecutor, defense counsel and the jury had all properly performed their respective functions and the true facts were permitted to be disclosed on the evidentiary record, no such criminal responsibility, much less guilt, could have been imposed upon petitioner. Petitioner was prevented, and therefore unable to interpose his defense at the trial on the merits. The trial court's refusal to permit accused to show the absence of a guilty intention, contributed to

his conviction and we submit that departure from the requirement of mens rea was gross error by the trial court, and indeed has grave due process implications.

We submit that the careless conduct of all leading characters in the trial of the case here questioned (judge, prosecutor and defense counsel) is inexcusable, engendering incurable prejudice in the Jury and the imposition of the penalty therefore, is impermissable if our courts are to administer justice. It opens the door to a vast expansion of the use of criminal penalties for purposes that are foreign, inconceivable and not in conformity with our jurisprudence. It is indeed offensive to our constitutional system, which need not be prostituted and results only in the furtherance of negligent and reckless administration of the law.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

The constitutional questions presented in this Petition are fundamental and were decided by the Maryland Courts in a manner contrary to the applicable decisions of this United States Supreme Court, raising squarely the issue of conflict with the due process clause of the United States Constitution. Of magnitude and upmost significance to our system of jurisprudence, is that we are addressing here the question of the imposition of criminal penalties upon an accused person, who throughout his so-called trial, was deprived at every step of the way, of the opportunity to

demonstrate that he should not be held accountable for the charged offenses. The prosecution failed to prove a scintilla of criminal intent. If the decisions of the Maryland Courts in this case are upheld, it would mean a clear invitation to state courts who could then impose a verdict of guilt upon an accused without fault or any rational connection to a charged offense.

Adequate counsel for the defense presupposes much more than just a mere desire to cross examine witnesses. Defense counsel for petitioner herein, did not preserve vital questions for review; did not move for a judgment of acquittal; nor for a Judgment N.O.V., nor for a mistrial; nor did he pursue the very essential and needed pre-trial discovery; nor did he object to extemely damaging hearsay evidence, allowed to be introduced by the presiding judge; nor did defense Counsel call the key witness for the defense, who could have exonerated petitioner altogether. Yet, the alleged statements of this same key witness were introduced by the prosecution through hearsay, which formed the nucleus of the prosecution's case.

Accused was viewed by all parties to the trial as guilty, requiring accused to prove his innocence; while our system strongly presupposes the accused to be innocent until proven guilty.

DECISIONS OF THE MARYLAND COURTS BELOW IN CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT

The IV, V, VI and XIV Amendments to our United States Constitution which are here primarily in question, involve values that can never be ignored, as was done conveniently in the Maryland Courts affecting the constitutional rights of petitioner herein, simply to increase the effectiveness of law enforcement, and record one more conviction.

The decisions of our United States Supreme Court are clearly intended to vindicate the public interest whenever lower Courts have not provided for a fair trial and an impartial verdict.

The strong interest of the community is to punish the guilty, not the innocent. If a Reversal is had on the grounds of insufficient evidence alone, it is tantamount to a Jury Verdict of not guilty. The highest Court of Maryland did not provide petitioner, with his right of appeal when there were numerous grounds for such an Appeal.

CONCLUSION

The decisions of the Courts of Maryland with respect to the actual safeguards of due process by the prosecution's case-in-chief, by the presiding judge, and by defense counsel, are in complete conflict with the decisions of this Supreme Court of the United States.

The rights of the accused, however elaborately safeguarded on paper, were ineffective in practice, and the Maryland Courts saw fit to ignore basic due process petitioner herein is entitled to as provided by the United States Constitution.

To insure the equal interpretation and application of this important and fundamental issue of federal law in the various state courts, we submit a writ of certiorari should issue to review the verdict and opinions of the Courts of Maryland here involved.

Respectfully submitted,

H. Hugo Perez
Counsel for Petitioner

Certificate of Service

I hereby certify that I am Counsel for Petitioner herein; that I have served three (3) copies of this Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland by depositing copies of same in the United States Mail at Washington, D.C., first class postage prepaid, addressed to:

Hon. Stephen H. Sachs
Attorney General for
State of Maryland
One South Calvert Street
Baltimore, Maryland 21202

This 25th day of April, 1980.

H. Hugo Perez, Esquire

Attorney for Petitioner
1102 National Press Building
Washington, D.C. 20045

APPENDIX

UN REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND
Application for Leave to Appeal
NO. 52

September Term 1978

POST CONVICTION

FAHED AHAIMED SUBAITANI

v.

STATE OF MARYLAND

Moore,
Lowe,
Melvin,
JJ.

PER CURIAM

Filed: June 16, 1978

On August 12, 1976, Fahed Ahaimad Subaitani, the applicant, was convicted in the Circuit Court for Montgomery County (Frosh, J.), of child abuse and assault. He was committed to the custody of the Division of Correction for a period of six years with all but one year suspended, and on his release to be placed on *probation* for five years. In an *unreported* per curiam opinion in *Subaitani v. State,* No. 1034, September Term, 1976, filed on June 9, 1977, we affirmed the child abuse conviction but *vacated* the sentence therefore and remanded the case to the Circuit Court for Montgomery County for *re-sentencing.* In addition we vacated the conviction for assault because of its merger into child abuse. On remand the court *re-imposed* the same sentence.

On October 4, 1977, a petition under the Uniform Post Conviction Procedure Act was filed by the applicant in the Circuit Court for Montgomery County. The petition was denied on April 10, 1978, by the Circuit Court for Montgomery County (Miller, J.). The applicant now seeks leave to appeal Judge Miller's ruling.

In his application the applicant contends that he did not have effective representation by his trial counsel because his counsel did not call the child as a witness. For the same reasons as set forth in the opinion of the hearing judge, a copy of which is appended hereto, we find the applicant's contention without merit.

In addition the applicant contends that certain evidence was improperly admitted into the post conviction proceedings. The Uniform Post Conviction Procedure Act provides post conviction relief *only for matters incident to trial* and does not extend to other proceedings such as post conviction proceedings. Thus since the applicant's second contention is not properly before us, we find it without merit.

LEAVE TO APPEAL DENIED.

IN THE

CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

FAHED AHAIMAD SUBAITANI,	:	
	:	
Petitioner	:	
	:	
	:	
	:	
v.	:	
	:	
		Misc. Pet. 5385
SUPERINTENDENT MARYLAND DEPARTMENT OF CORRECTIONS	:	
	:	
	:	
	:	
Respondent	:	

OPINION AND ORDER

The petitioner, Fahed Ahaimad Subaitani, pursuant to the Uniform Post Conviction Procedures Act, Article 27, Section 645A of the Annotated Code of Maryland requests that he be granted a new trial in criminal case No. 17659. In that case, he was found guilty by a jury of child abuse and sentenced to six (6) years with all but one (1) year suspended under the jurisdiction of the Maryland Department of Corrections.

The petitioner asserts that he has exhausted his *right of appeal in the criminal case.* There are four (4) *allegations* set forth as (a) thru (d) all of which are *alleged to constitute inadequacy of trial counsel.*

There was no evidence presented with regard to allegations (a) and (b) and bald allegations cannot furnish a basis for post conviction relief. Allegation (d) was *fully litigated,* decided *adversely to the petitioner* in the appeal of his criminal case and, likewise, cannot be a basis for post conviction relief.

Evidence was heard with regard to allegation (c). The substance of that claim is that petitioner's attorney in the criminal trial, Richard Bonderiff, failed to call as a witness, Jennifer Ballew, the victim of the child abuse.

A defendant, in a *criminal* proceeding, is *not entitled* to a *perfect* trial but rather a *fair proceeding.* The test for inadequacy of counsel in a post conviction hearing is whether under all the circumstances of the particular case the petitioner has been afforded a genuine and effective representation, *Slater* v. *Warden* 241 Md. 688; *Jones v. Warden,* 244 Md. 720. the *petitioner bears the burden of proof in proving inadequacy* of counsel, *State v. Hardy,* 2 Md. App. 150.

Mr. Bonderiff testified that he did not call the witness after she had made inconsistant statements on the different occasions when he interviewed her. While it seems probable that the defendant would call the alleged victim if her testimony was favorable that

position cannot be assumed by the State's failure to call the witness. The only testimony before the Court is that *her testimony might have been unfavorable* and in such cases the discretion of trial counsel will not be disturbed. Although failure to call a witness may amount to inadequacy of counsel, *Evans v. Warden,* 240 Md. 333 it is not so in every case. *State v. Mahoney,* 16 Md. App. 193, and the Court is of the opinion *it was not a mistake* in this case.

For the reasons asserted it is this 10th day of April, 1978, by the *Circuit Court for Montgomery County,* Maryland,

ORDERED that the petitioner's request for post *conviction relief* and a *new trial is denied.*

H. RALPH MILLER
Judge of the Circuit Court
for Montgomery County, Maryland

FAHED AHAIMED SUBAITANI	**In the Court of Appeals of Maryland**
v.	
	Petition Docket No. 184
	September Term, 1977
STATE OF MARYLAND	**(No. 1043, September Term, 1976 Court of Special Appeals)**

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy

Chief Judge

Date: September 7, 1977.

Supreme Court of the United States

NO. A-470

FAHED AHAIMAD SUBAITANI,
Petitioner,

v.

MARYLAND

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 4, 1978

/s/Warren E. Burger

Chief Justice of the United States.

Dated this 1st
day of December, 1977